IN THE HIGH COURT OF PUNJAB AND HARYANA AT CHANDIGARH

CWP No.4619 of 1988
Date of decision:18.9.2006

The Food Corporation of India

....Petitioner

versus

The Regional Provident Fund Commissioner, Chandigarh and others

.....Respondents.

CORAM: HON'BLE MR. JUSTICE ADARSH KUMAR GOEL

Present: Mr. Harbhagwan Singh, Sr. Advocate with Mr. JP Bhatt, Advocate and Mr. Gopi Chand, Advocate, for the petitioner.

Mr. Kamal Sehgal, Advocate.

JUDGMENT:

This petition has been filed for quashing order of assessment of dues under Section 7A of the Employees Provident Funds and Miscellaneous Provisions Act, 1952 (for short, 'the EPF Act') dated 4.4.1988, Annexure P.8.

Case of the petitioner is that it is a statutory Corporation under the provisions of the Food Corporation of India Act, 1964 (for short, 'the FCI Act') dealing in import/procurement/storage/movement and distribution of food-grains throughout the country. Work of the petitioner-Corporation includes the work of transport, loading, unloading and handling of food-grains for which the Corporation employs contractors by awarding handling and transport contracts. The contractors are appointed usually for two years by inviting tenders. The contractor further appoints labour for carrying out the work under the contract.

Vide letter dated 2.1.1981, Annexure P.1, the Regional provident Fund Commissioner, Punjab, Haryana, Himachal Pradesh and Union Territory of Chandigarh, issued summons to the petitioner under Section 7A of the Act for determining the amount due. It was stated that for

the period from 1/68 to 11/80, the petitioner failed to remit Employer and Employees share of Provident Fund Contribution, as required under paras 30 and 38(i) of the Employees Provident Fund Scheme, 1952 (for short, 'the EPF Scheme'). Similarly, Family Pension Fund Contribution was also due under paras 9(1), 10(i), (2) and (3) of the Employees Family Pension Scheme, 1971; Employees Contribution under the Employees Deposit Linked Insurance Scheme, 1976 was also due for the said period and Administrative charges were also due for the said period.

The petitioner filed a writ petition challenging constitutional validity of Section 7A of the Act, which was dismissed on 17.10.1985 with a direction that the RPF Commissioner shall give its finding on the question "whether the petitioner is a principal employer or not?".

The petitioner filed objections dated 13.6.1986, inter-alia, stating that names of labour for whom fund was being claimed were not mentioned; no copy of complaint made by any employee was furnished; there was no relationship of employer and employee between the FCI and the labour; no notice was served upon the contractor and the issue ought to be referred to the Central Government under Section 19A of the Act.

The RPF Commissioner vide order Annexure P.6 dated 28.7.1987 rejecting preliminary objections of the petitioner, held that the FCI was the principal employer in respect of employees engaged by Transport Handling Contractors and such employees were covered by the definition of "employee" under section 2(f) of the Act and directed that the case be put up for assessment of statutory dues. In the said order, reliance was also placed on circulars issued by the Head office requiring offices of the FCI to ensure that the benefits under EPF Act, 1952 are extended to the employees of the contractors. The petitioner filed CWP No.4586 of 1987 which was dismissed in limine by this court but the Hon'ble Supreme Court directed that the writ petition be admitted and finally heard. The said petition has also been simultaneously heard. The RPF Commissioner vide order dated 4.4.1988, Anenxure P.8 determined amount of Rs.33,39,115/- as payable by the FCI on account of Provident Fund Contributions, Administrative Charges, Family Pension Contributions, Employees Deposit Linked Insurance Contributions and Insurance Administration Charges for the period from January 1968 to November 1980. Basis of the assessment was

Handling Godown Expenses and transportation cost. As per records of the FCI, 25% of the total monthly expenditure was taken into account under the head “Handling godown”.

In its reply, the Food Corporation of India Workers Union submitted that the Central Government had already given a clarification after high level meeting held on 6.12.1985 which was Annexure R.3/1. The FCI was principal employer in respect of the employees of the contractors hired by the FCI, which was the stand of the FCI, HQ communication dated 9.1.1986.

As per stand of the RPF Commissioner, the FCI was liable to maintain registers, in absence of which the order passed was justified.

In the additional affidavit filed on behalf of the petitioner on 5.12.2002, it has been stated that under the Tender Document, liability to pay EPF under the EPF Act was of the contractors themselves. The letter dated 9.1.1986, Annexure P.7, issued by the Food Corporation of India, was not by any competent officer. It has been submitted that under Para 36-B of the Scheme, the contractor was liable for the dues.

Further additional affidavit was filed on 11.12.2002 to the effect that under section 16(1) (c) of the Act, the FCI having been constituted under Central Act i.e. FCI Act, 1964, was exempted, as its employees were entitled to benefit of contributory provident fund or old age pension in accordance with the Scheme.

In reply to the above affidavit, the RPF Commissioner filed counter affidavit dated 15.1.2003 to the effect that the the benefit of Section 16(1) (c) was not being extended to the workers engaged by the contractors. The FCI Contributory Provident Fund Regulations 1967 have also been filed as Annexure P.10, which show that the said regulations apply to regularly appointed employees, employees absorbed permanently and temporary employees. The same do not apply to employees of the contractors.

I have heard learned counsel for the parties.

Learned counsel for the petitioner submitted that the impugned order was vitiated as the Commissioner failed to identify workers and recorded the finding merely on the ground that the FCI failed to maintain the registers. Reliance has been placed on judgment of the Hon'ble Supreme

Court in the case of the petitioner itself i.e. **FCI v. Provident Fund Commissioner and others,** (1990) 1 SCC 68. It was also submitted that the FCI was exempted under Section 16(1) (c) of the EPF Act as the FCI had its own scheme for provident fund.

Learned counsel for the Provident Fund Commissioner supported the impugned order and also raised an objection to the maintainability of writ petition on the ground that alternative remedy of appeal was available to the petitioner. Reliance was placed on judgment of the Hon'ble Supreme Court in **Sumedico Corporation and another v. Regional provident Fund Commissioner,** 1999 LAB.I.C.2626, wherein the Hon'ble Supreme Court relegated the petitioner therein to the remedy of appeal.

From the contentions of the parties, following questions arise for consideration :-

(i) Whether remedy of the petitioner was by way of appeal, as per judgment of the Hon'ble Supreme Court in **Sumedico Corporation**'s case (supra)?

(ii) Whether exemption under section 16(1) (c) of the Act was applicable to the employees of the contractors and on that ground the impugned order is liable to be set aside?

(iii) Whether the Commissioner is justified in making the assessment of PF dues of employees of the contractors hired by the petitioner without identifying the workers concerned as required in the judgment of the Hon'ble Supreme Court in **FCI's** case (supra)?

Before dealing with the above questions, it may be noted that learned counsel for the petitioner has made a statement that the petitioner stood by the statement made on 26.5.1989, even now and for future and that so far no worker has come forward.

Proceedings of this court on 26.5.1989 are as under:-

"Reply on behalf of respondent No.3 has been filed. The Civil Miscellaneous was taken up for hearing and several suggestions were made by the learned counsel for one or the other party. On the basis of these suggestions, a consensus has emerged. Let the statement be recorded.

Statement of Shri Gopi Chand, Advocate, for the petitioner w/o:

If any worker or workers appear before the Regional Provident Fund Commissioner and make a claim, the Regional Provident Fund Commissioner may determine the eligibility of such worker or workers for the relevant period in accordance with the provisions of the Employees' Provident Fund and Miscellaneous Provisions Act, 1952, after notice to Food Corporation of India Regional Office, Punjab. The petitioner undertakes to deposit the amount in accordance with the direction of the Regional Provident Fund Commissioner in the account of the worker/workers concerned in the EPF Trust created by the Corporation. The aforesaid amount shall be disbursed only after notice to FCI and on the worker concerned furnishing security which shall be accepted after notice to FCI. Recovery of the amount of Rs.3339115/- shall remain stayed till decision of the Civil Writ petition.

Order:

In view of the above statement, recovery of the disputed amount i.e. Rs.3339115/- is stayed subject to the following directions. If any worker or workers appear before the Regional Provident Fund Commissioner and make a claim the Regional Provident Fund Commissioner shall determine the eligibility of such worker or workers

for the relevant period in accordance with the provisions of the Employees Provident Fund and Misc. Provisions Act, 1952, after notice to the Food Corporation of India, Regional Office, Punjab. The petitioner undertakes to deposit the amount in accordance with the directions of the Regional Provident Fund Commissioner in the account of the worker/workers concerned in the CPF Trust created by the Corporation. The aforesaid amount shall be disbursed to the employees concerned only after notice to the FCI and on the worker concerned furnishing security to the satisfaction of the Regional Provident Fund Commissioner which shall be accepted after notice to the FCI. The aforesaid arrangement is made subject to the final decision of the Civil Writ Petition No.4619 of 1988."

I now proceed to deal with the questions.

Question No.(i)

Learned counsel for the petitioner submitted that remedy of appeal was not available when the writ petition was filed and it is only by amendment made in the year 1997 that remedy of appeal has been provided. No doubt, in the judgment relied upon by the respondents, the Hon'ble Supreme Court directed that the remedy of appeal should be availed of but the said direction was on facts of that case and it has not been held as a matter of law that appeal will become available as of right in respect of decisions rendered much earlier.

Learned counsel for the respondents has not been able to rebut this contention.

Question No.(i) has, thus, to be answered in favour of the petitioner and it has to be held that remedy of appeal was not available to the petitioner as of right and the writ petition is not liable to be dismissed on that ground.

Question No.(ii)

Provisions of Section 16(1) (c) of the EPF Act will be attracted if it can be shown that concerned employees are covered by any

other scheme in the establishment. It has not been shown that the workers engaged by the contractors are covered by any provident fund scheme. The impugned order, is thus, not liable to be set aside on that ground.

Question No.(iii)

Learned counsel for the petitioner relied upon judgment of the Hon'ble Supreme Court in **FCI's** case (supra). In the said case, the Provident Fund Commissioner determined the amount due on the ground that the FCI failed to maintain registers in respect of workers employed, as required under the provisions of the Contract Labour (Regulation and Abolition) Act, 1970. The Hon'ble Supreme Court observed that power given to the Commissioner was not to decide abstract questions of law but to determine actual concrete differences in payment of contribution and other dues by identifying the workmen and it would be failure to exercise the jurisdiction if the Commissioner did not exercise powers to collect evidence. The matter was remanded to the Commissioner to pass a fresh order.

In the present case also, the Commissioner has not summoned the contractors to identify the workers and has determined the dues without doing so. In view of judgment relating to the case of the petitioner itself, the matter will have to be remanded back to the Provident Fund Commissioner for passing a fresh order in the light of the said judgment of the Hon'ble Supreme Court. This question stands answered accordingly.

In view of the above, the impugned order is set aside and the matter is remanded to the Regional Provident Fund Commissioner for passing a fresh order in accordance with law. The petitioner will remain bound by the statement made in this court recorded hereinabove.

The writ petition is disposed of accordingly.

Sept. 18, 2006 (Adarsh Kumar Goel)
Judge